

OCA FILE

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16 August 1988

OCA 2780-88

MEMORANDUM FOR: Chief, Administrative Law Division/OGC

FROM: [redacted] Legislation Division
Office of Congressional Affairs

SUBJECT: DoD Proposed Report on Draft Bill to Amend
Title 10, USC, Re: Jurisdiction Over Members
of Armed Forces and Certain Civilians

1. Attached for your review and comment is a copy of a letter relaying the views of the Department of Defense on a draft bill concerning the above-captioned subject. This bill (also attached) would allow punishment under the criminal code of persons who committed crimes while members of the armed forces outside the United States or while serving with, employed by or accompanying the armed forces outside the United States. The Office of Management and Budget has asked for our views on this letter.

2. In order that we may respond to OMB in a timely manner, I ask that you relay your comments to me no later than 26 August 1988. You may telephone me [redacted]

Attachments

OCA/RMH/bsb: [redacted] 17 Aug 88

Distribution:

Orig - addressee

1 - D/OCA (w/att.)

1 - DD/LEG (w/att.)

1 - OCA Records (w/att.)

1 - RMH Chrono (w/o att.)

1 - OCA/LEG Subj. File (Crimes/Criminal Code) (w/att.)

Honorable Daniel K. Inouye
United States Senate
Washington, DC 20510

Dear Senator Inouye:

This is in response to your request for the views of the Department of Defense on a draft bill to amend title 10, United States Code, to provide for jurisdiction, apprehension, and detention of members of the Armed Forces and certain civilians accompanying the Armed Forces outside the United States.

The purpose of the proposed legislation is to fill certain jurisdictional voids involving offenses committed by United States nationals abroad. The Supreme Court has held that, at least in peacetime, civilians may not be tried by courts-martial for offenses against military law that they may have committed abroad when they were members of the United States Armed Forces or when they were serving with, employed by, or accompanying the Armed Forces. Further, under existing statutes, acts committed by United States nationals abroad generally do not constitute offenses against United States civilian law even though they would constitute such offenses if they had been committed in this country. Thus, civilian nationals of the United States are generally not accountable to United States courts for their conduct abroad.

The proposed legislation would remedy this situation for conduct abroad by civilians who, at the time of the acts in question, were members of the Armed Forces or were serving with, employed by, or accompanying the Armed Forces. The proposal would generally provide that such conduct would be subject to the

same civilian criminal proscriptions that apply in areas under Federal jurisdiction. The proposal would also authorize the Armed Forces to arrest and confine suspected violators abroad and to deliver them to United States civilian authorities for prosecution or to a foreign country for trial under its laws.

While The Department of Defense agrees that it would be desirable to close jurisdictional gaps of the nature described, we have the following objections and comments on this draft legislation.

The Department opposes proposed sections 992(d) and 993 of title 10, United States Code, appearing on pages 4 and 5 of the draft bill. These provisions would authorize the Armed Forces to arrest and confine suspected military and civilian offenders and to deliver them to other United States or foreign authorities for prosecution.

The Armed Forces already have the authority to arrest, confine and deliver for prosecution military members on active duty. We do not anticipate problems for the continued exercise of this authority in light of previous unsuccessful judicial challenges. With regard to civilian suspects, the Department believes that existing extradition procedures suffice. An expansion of civilian law enforcement functions for the Armed Forces as provided in the draft bill would divert military resources and interfere with the performance of the national defense mission. Civilian law enforcement functions are properly the responsibility of other agencies specifically established for that purpose.

Proposed section 992(a), which would establish overseas criminal jurisdiction for military members and certain civilians serving with or accompanying the Armed Forces overseas, does not appear to cover narcotics offenses under title 21, U.S. Code. We recommend that, as in prior versions of this proposed legislation, title 21 drug offenses be included.

Finally, the drafters of this bill inserted a parenthetical query in section 992(b)(1) as to whether a military member's criminal conduct under title 18 would ever not be punishable by court-martial. Section 992(b)(1) provides that a member of the Armed Forces may not be prosecuted under section 992 for offenses overseas if the member is subject to trial by court-martial for such conduct. In answer to the parenthetical question, the U.S. Supreme Court held in Solorio v. United States, ___ U.S. ___, 107 S.Ct. 2924, reh'g denied 108 S.Ct. 30 (1987), that court-martial jurisdiction depends solely on the accused's status as a member of the Armed Forces, not the "service connection" of the alleged offense. Thus, Service members may be prosecuted by court martial for any offense punishable under title 18, either as a violation of a specific punitive article of the Uniform Code of Military Justice (UCMJ) or as an "other offense not capital" under Article 134, UCMJ. The intent of section 992(b)(1), however, is to clarify that Federal civilian court jurisdiction for overseas offenses under section 992 would not interfere with the exercise of court-martial jurisdiction over current active duty members. Section 992 would extend jurisdiction only

to civilians accompanying or employed by the Armed Forces overseas and to former Service members who committed offenses overseas prior to discharge from the military. The Department supports this limitation in section 992(b)(1).

Subject to the foregoing comments and objections, we support the proposed legislation.

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Non D/D Item 2797

DISCUSSION DRAFT
June 29, 1988

100TH CONGRESS
2D SESSION

S. _____

IN THE SENATE OF THE UNITED STATES

Mr. INOUE introduced the following bill; which was read twice and referred to
the Committee on _____

A BILL

To amend title 10, United States Code, to provide for jurisdiction, apprehension, and detention of members of the Armed Forces and certain civilians accompanying the Armed Forces outside the United States, and for other purposes.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assem-*
- 3 *bled,*

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1 **SECTION 1. CRIMINAL OFFENSES COMMITTED OUTSIDE THE**
2 **UNITED STATES**

3 (a) **IN GENERAL.**—Subtitle A of title 10 of the United
4 States Code is amended by inserting after chapter 49 the
5 following new chapter:

6 **“CHAPTER 50—CRIMINAL OFFENSES COMMITTED**
7 **OUTSIDE THE UNITED STATES**

“Sec.

“991. Definitions.

“992. Criminal offenses committed by a member of the armed forces or by any
person serving with, employed by, or accompanying the armed
forces outside of the United States.

“993. Delivery to authorities of foreign countries.

8 **“§ 991. Definitions**

9 **“In this chapter:**

10 **“(1) The term ‘United States’ includes the spe-**
11 **cial maritime and territorial jurisdiction of the United**
12 **States.**

13 **“(2) The term ‘special maritime and territorial**
14 **jurisdiction of the United States’ has the same mean-**
15 **ing as is provided in section 7 of title 18.**

16 **“(3) The term ‘criminal offense’ means an of-**
17 **fense classified in section 1 of title 18 as a felony or**
18 **a misdemeanor (not including a petty offense).**

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1 "§ 992. Criminal offenses committed by a member of the
2 armed forces or by any person serving with, em-
3 ployed by, or accompanying the armed forces out-
4 side of the United States.

5 "(a) Any person who, while serving as a member of
6 the armed forces outside the United States, or while serv-
7 ing with, employed by, or accompanying the armed forces
8 outside the United States, engages in conduct which would
9 constitute a criminal offense if the conduct were engaged
10 in within the special maritime and territorial jurisdiction of
11 the United States shall be guilty of a like offense against
12 the United States and shall be subject to the same punish-
13 ment as is provided under the provisions of title 18 for
14 such like offense.

15 "(b) Subsection (a) does not apply to the conduct
16 of—

17 "(1) a member of the armed forces who, at the
18 time of the return of an indictment or the filing of an
19 information in any court of the United States or in
20 the court of any State in connection with such con-
21 duct, is subject to trial by court-martial for such con-
22 duct [*NOTE: Would there ever be a case in which a*
23 *service member's criminal conduct under title 18,*
24 *USC, is not punishable by a court-martial?]; and*

25 "(2) an employee of the United States who is a
26 national of the country in which the employee en-

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1 gaged in such conduct and who was appointed to his
2 position of employment while residing in that coun-
3 try.

4 "(c) If the court of a foreign government tries a
5 person described in subsection (a) for conduct described in
6 such subsection, no trial may be instituted under this sec-
7 tion in any court of the United States for the same conduct
8 except upon the written approval of the Attorney General
9 of the United States, the Deputy Attorney General of the
10 United States, the Associate Attorney General of the
11 United States, or an Assistant Attorney General of the
12 United States. The authority to approve the trial of any
13 person under this subsection may not be delegated below
14 the level of Assistant Attorney General.

15 "(d)(1) The Secretary of Defense may designate and
16 authorize members of the armed forces to apprehend and
17 detain, outside the United States, any person described in
18 subsection (a) who is reasonably believed to have engaged
19 in conduct which constitutes a criminal offense under such
20 subsection.

21 "(2) A person apprehended and detained under para-
22 graph (1) shall be released to the custody of civilian law
23 enforcement authorities of the United States for removal to
24 the United States for judicial proceedings in relation to
25 conduct referred to in such paragraph unless (A) such

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1 person is delivered to authorities of a foreign country
2 under section 993 of this title, or (B) such person is pend-
3 ing court-martial under chapter 47 of this title for such
4 conduct.

5 "§ 993. Delivery to authorities of foreign countries

6 "(a) Any member of the armed forces designated and
7 authorized under subsection (d) of section 992 of this title
8 may deliver any person described in subsection (a) of such
9 section to the appropriate authorities of a foreign country
10 in which such person is alleged to have engaged in conduct
11 described in such subsection (a) if—

12 "(1) the appropriate authorities of that country
13 request the delivery of the person to such country for
14 trial for such conduct as an offense under the laws of
15 that country; and

16 "(2) the delivery of such person to that country
17 is authorized by a treaty or other international agree-
18 ment to which the United States is a party.

19 "(b) The Secretary of Defense may confine or other-
20 wise restrain a person whose delivery is requested under
21 subsection (a) until the completion of the trial of such
22 person by the foreign country making such request.

23 "(c) The Secretary of Defense shall determine what
24 officials of a foreign country constitute appropriate au-
25 thorities for the purposes of this section."

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- 1 (b) TECHNICAL AMENDMENT.—The tables of chapters
- 2 at the beginning of such title and such subtitle are each
- 3 amended by inserting after the item relating to chapter 49
- 4 the following:

"50. Criminal Offenses Outside the United States 991."